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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 565

RUTH LOUGHRAN, *Petitioner*,

v.

JOHN LOUGHRAN, JOSEPH LOUGHRAN and CHARLES LOUGHRAN, TRUSTEES OF THE ESTATE OF DANIEL LOUGHRAN, SR., *Respondents*.

On Writ of Certiorari to the Court of Appeals of the District of Columbia

BRIEF FOR RESPONDENTS

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In The

Supreme Court of the United States

October Term, 1933

No. 565

Ruth Loughran, *Petitioner,*

v.

John Loughran, Joseph Loughran and Charles Loughran, Trustees of the Estate of Daniel Loughran, Sr., *Respondents.*

BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the Court of Appeals of the District of Columbia (R. 32-35) is reported in 66 F. (2d), page 567.

Jurisdiction

The judgment of the Court of Appeals was entered June 26, 1933. A petition for rehearing was denied August 8, 1933. A petition for certiorari was filed October 31, 1933. The jurisdiction of this Court rests upon Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

Statute Involved

Section 966, page 279, District of Columbia Code 1924, restated in Title 14, Section 63, page 143, District of Columbia Code, 1929:

> "A divorce from the bond of marriage may be granted only where one of the parties has committed adultry during the marriage; Provided, *That in such case the innocent party only may remarry*, but nothing herein contained shall prevent the remarriage of the divorced parties to each other." (Italics ours.)

Question Presented

1. Whether upon a hearing on Bill and Answer, when the Answer denies the allegations of the Bill to the effect that the remarriage in Florida of a guilty party in a divorce proceeding was in good faith, and the allegations as to a domicile or residence in Florida in good faith are likewise denied, the courts of the District of Columbia are required to disregard Sec. 966 D. C. Code above quoted and to recognize the Florida marriage and award dower.

Outline of Argument

This case was heard on Bill and Answer. As the Answer denied that petitioner became a bona fide resident of Florida, and that the marriage in Florida was in good faith, the only question submitted to the Trial Court was whether a residence in Florida acquired in bad faith, and a marriage in bad faith, i.e., with intent to evade the prohibition of Section 966 D. C. Code against the guilty party to a divorce suit remarrying, must be recognized by the District of Columbia courts. If the good faith of the Florida domicile and marriage is denied, the case presented to the Trial Court was identical with that of *Olverson* v. *Olverson*, 54 App.

D. C. 48, whose decision the Court below merely followed:

Section 966 D. C. Code announces the public policy of the District of Columbia. The Full Faith and Credit clause does not require the courts of this District to recognize a marriage in violation of the public policy of the District of Columbia itself. The good faith of the alleged residence in Florida being denied, the petitioner, so far as the case presented to the Trial Court was concerned, must be taken as domiciled in the District of Columbia. Section 1285 of the D. C. Code impliedly makes the foreign marriage of one domiciled in the District, who is forbidden to remarry, null and void.

A Court of Equity has the right to deny equitable relief to one who has deliberately created a situation contrary to the public policy of the *lex fori*. The "valid where performed, valid everywhere doctrine" has no application herein.

The Facts

This cause was heard in the Supreme Court of the District of Columbia holding an *Equity Court*, upon the motion of the complainant to set the cause for hearing on bill and answer (R. 25). Before advising the Court of the averments of the bill and answer, we invite the Court's attention to Equity Rules 29 and 33 of the Supreme Court of the District of Columbia:

Rule 29:

> "The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies,

unless the defendant is without knowledge, in which case he shall so state, *such statement operating as a denial.*"

Rule 33:

"Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set off, or counter-claim the plaintiff may, upon five days notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter."

The bill of complaint alleged the petitioner to be a resident of the District of Columbia and a citizen of the United States; that the defendants were citizens of the United States and residents of the District of Columbia—the capacity in which they were sued. It alleged that on December 12, 1924, the petitioner was divorced in the Supreme Court of the District of Columbia from her then husband, Henry Daye, and that a year or more prior to the granting of the divorce she had removed from the District of Columbia and made her home and residence in the State of Florida and that on January 16, 1926, she was married in Florida (R. 1-2). It was alleged that the marriage of complainant and Daniel Loughran, Jr., on January 16, 1926, in the State of Florida was in all respects a marriage in good faith and was duly celebrated in accordance with the laws of Florida and entitled to full faith and credit in the District of Columbia (R. 2). The respondents answered that they were without knowledge as to such allegations (R. 17), which under the aforementioned rule of Court operated as a denial that the marriage in Florida was in good faith.

Complainant alleged she resided in Florida with Daniel Loughran, Jr., from the time of her marriage until July 1,

1927, at which time Daniel Loughran, Jr., established a residence in Virginia and there wrongfully instituted proceedings against complainant for an absolute divorce. Complainant filed a cross-bill, which was granted (R. 2-12). These allegations were denied (R. 17).

Complainant alleged in paragraph five of her bill (R. 2-3) the legality of the Florida marriage, the limited divorce and alimony granted to petitioner by the Virginia Court and that both were entitled to full faith and credit in the District of Columbia and the effect of the Virginia decree upon the estate of Daniel Loughran, Jr. (R. 3).

The respondents answered that such allegations were argumentative and conclusions of law requiring no answer (R. 17).

Daniel Loughran, Jr., died possessed of certain real estate located in the District of Columbia and his will was filed for probate in the Supreme Court of the District of Columbia. The complainant protested the admission of the will to probate, raising the question of the domicile of Daniel Loughran, Jr., and also challenging his mental competency (R. 4-5). The answer admitted the death of Daniel Loughran, Jr., and the filing of a petition for the probate of his will, and averred that the petitioner attacked the jurisdiction of the District of Columbia Court, because of the questioned domicile of the deceased. Nevertheless, the complainant requested the Equity branch of the Supreme Court of the District of Columbia to exercise its jurisdiction in said estate (R. 20).

The respondents averred in their answer (R. 23-24) that she had neither legal right nor equity in her complaint, and was not entitled to the extraordinary relief sought. They averred that prior to her marriage, as alleged, to Daniel Loughran, Jr., she was and had been for some years theretofore the lawful wife of one Henry Daye and that he, as the husband of petitioner, then known as Ruth Daye, filed in the Supreme Court of the District of Columbia, a

petition for an absolute divorce. Respondents made part of their answer to the bill of complaint, the petition, answer and decree in said cause aforesaid as if fully set out (R. 24). Respondents further said that in said cause Daniel Loughran, Jr., was named co-respondent and that on December 12, 1924, the Court decreed a final and absolute divorce to Henry Daye from his then wife and petitioner herein, Ruth Daye, by reason of her adultry with the co-respondent Daniel Loughran, Jr. Respondents further averred that by Section 966 of the Code of Laws of the District of Columbia this complainant was denied the right of remarriage (R. 24). They averred that petitioner directly contrary to and in violation of the terms of the statute married Daniel Loughran, Jr., the co-respondent in the proceedings hereinbefore named, and that having openly and in utter disregard of the prohibition contained in said statute violated the terms thereof, she cannot now return to the Supreme Court of the District of Columbia and make application for relief with respect to the very situation and relationship which she could and did create only in direct violation of the prohibitory mandate of the statute which was in full force and effect in the District of Columbia and which the trial Court was bound to respect and administer. Respondents further averred that the declaration by the Congress of the United States in Section 966 was a legislative declaration of a general public policy to govern in this District and which should govern and control the conduct of those found guilty of adultry in the courts thereof. Respondents averred that petitioner was without right to ask or to expect to receive from the courts of the District of Columbia, and especially in equity, the extraordinary relief and assistance which she prayed in her bill, and that she should be left with respect to that situation and relationship, which she created by violation of the law of this District, where her own misconduct in violating said law

had placed her (R. 24). The Petitioner moved for hearing on bill and answer. Petitioner's motion was as follows:

> "Now comes the complainant by her attorney and moves to set this cause for hearing on bill and answer"

(R. 25). Upon such hearing the trial court entered its decree (R. 26).

The Court granted the motion and the case was so heard.

ARGUMENT

I.

As the Answer Denied That Plaintiff Became a Bona Fide Resident of Florida, and That the Marriage in Florida Was in Good Faith, the Only Question Submitted to the Court Is Whether a Residence in Florida Acquired in Bad Faith, and a Marriage in Bad Faith, Must Be Recognized by the District of Columbia Courts.

The present case was heard upon Bill and Answer (R. 25, 32). As already seen from the statement of facts in the present brief (p. 4), plaintiff in paragraph 3 of her Bill (R. 1, 2) alleged that a year or more *prior* to her divorce from Daye, she removed from the District of Columbia and made her home and residence in Florida, in which State "while a bona fide resident thereof" she married Loughran (R. 2).

In paragraph 3 of the Answer (R. 17) respondents averred that they were without knowledge as to these allegations.

In paragraph 5 of the Bill plaintiff averred that her marriage to Loughran in Florida "was in all respects a marriage in good faith." As to this allegation respondents in paragraph 5 of the Answer (R. 17) averred that this alle-

gation was argumentative and but a conclusion of law which required no answer.

Under Rule 29 of the Equity Rules of the Supreme Court of the District of Columbia, the averment that defendant was without knowledge operated as a denial. It should be noted that there is no allegation in the Bill that plaintiff established a *domicile* in Florida; it is merely averred that she removed thereto and made her home and residence therein (Par. 3, R. 1-2). There is no direct allegation in the Bill that she removed to Florida in good faith and not for the purpose of attempting to evade and circumvent the prohibition of Section 966 of the District of Columbia Code against her remarriage. There is only the allegation that "while a bona fide resident" of Florida she married Loughran (Par. 3, R. 2).

Even if the allegation that "while a bona fide resident" of Florida she married Loughran is not a conclusion, and even if it is sufficient to allege that in good faith she removed to Florida and established her domicile there and there married Loughran, it still stands denied on the present record (a) that she removed to Florida and established her domicile or residence there in good faith and not for the purpose of evading the District of Columbia law; (b) that she there married Loughran in good faith.

It is unquestioned that as of the date of the decree of divorce against plaintiff, December 12, 1924 (R. 1), plaintiff was domiciled in and a resident of the District of Columbia. Her domicile was necessarily that of her then husband, Daye. The present petition alleges she is *now* a resident of the District of Columbia (R. 1).

Defendants in answering plaintiff's bill herein made a part of their answer the proceedings in the divorce suit of plaintiff's husband, Daye, against her in the Supreme Court of the District of Columbia, Equity No. 43202 (R. 23). This suit was filed October 20, 1924, and alleged that both plaintiff and defendant (the plaintiff herein) were residents of

the District of Columbia on that date. Plaintiff herein was personally served in that suit in the District of Columbia October 20, 1924, and, interposing no defense, did not deny that she was a resident of the District of Columbia at that time. The suit among other things recites that the defendant (plaintiff herein) had theretofore on July 30, 1923, filed a suit for a limited divorce against her husband, Daye, in the Supreme Court of the District of Columbia, Equity No. 41561, in which suit she likewise recited that she was on July 30, 1923, a resident of the District of Columbia. The interlocutory decree in the divorce suit of Daye against his wife, Equity No. 43202, was entered December 12, 1924 (R. 1); the final decree was signed April 3, 1925, and recites that it shall not be effective until the expiration of the time allowed for taking an appeal. The time allowed for taking an appeal under Rule 10, Court of Appeals of the District of Columbia, is twenty days after the signing of the final decree. It follows, therefore, that plaintiff in the present case could not have attempted to secure an alleged bona fide domicile or residence in Florida until April 25, 1925. She was married to Loughran on January 16, 1926 (Par. 3, R. 2) or seven months and some days after the time when she was unquestionably a bona fide resident of the District of Columbia. The statement, therefore, in paragraph 3 of her Bill of Complaint herein that "for a year or more *prior*" to her absolute divorce from Daye she had removed from the District of Columbia and made her home and residence in Florida and became a bona fide resident thereof (a mere conclusion of the pleader) stands contradicted by plaintiff's other statements of record which are part of the present case. Further, the claim of any extended bona fide residence in Florida is contradicted by the statement on page 14 of petitioner's brief in the present case that the record herein shows "that more than a year *after* she was charged with adultery in the District of Columbia she established a new domicile in Florida." As before noted

she was charged with adultery on October 20, 1924. According, therefore, to counsel's statement in petitioner's brief, she could not have begun to establish a new domicile in Florida until after October 20, 1925. As she was married to Loughran on January 16, 1926, she had, according to her own counsel, less than three months within which to establish the so-called bona fide domicile in Florida which petitioner's counsel so vigorously asserts.[1] In any event, the allegations of the Bill fall far short of a clear showing that she had effected in good faith a domicile in Florida without intent to evade the prohibition against remarriage of the District of Columbia statute, particularly when it is considered that the allegations as to removal from the District and the establishment of her residence in Florida and her alleged bona fide marriage to Loughran stand denied by the answer herein. As to the "residence" in Florida alleged in paragraph 3 of plaintiff's Bill (R. 2), it certainly could not have been a *legal* residence, for under Florida law a legal residence for purposes of divorce requires two years'

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[1] The following table shows the chronology:

July 30, 1923—Plaintiff marries Daye in D. C. Plaintiff files suit against Daye for limited divorce, alleging she is resident of D. C. (Equity No. 41561).

October 20, 1924—Daye sues Plaintiff for divorce on ground of adultery with Loughran, alleging Plaintiff is resident of D. C. Plaintiff is served in D. C. and does not contest suit (Equity No. 43202).

December 12, 1924—Interlocutory decree of divorce entered for Daye against Plaintiff herein (R. 1). Plaintiff still domiciled in D. C., as domicile is still that of her husband according to law:

April 25, 1925—Final decree of divorce effective. Plaintiff still domiciled in D. C.

January 16, 1926—Plaintiff marries co-respondent Loughran in Florida (R. 2).

July, 1927—Loughran "wrongfully" sues Plaintiff for absolute divorce in Virginia (R. 2); Plaintiff asserted Virginia Court had no jurisdiction.

November 8, 1929—Plaintiff on cross-bill in Virginia obtains decree of divorce *a mensa et thoro* from Loughran (R. 12).

August 29, 1932—Plaintiff in Bill claims for first time she established residence in Florida prior to December 12, 1923, thereby contradicting (a) her statement under oath in Equity No. 41561, (b) fact that she was sued and served as resident of D. C. in Equity No. 43,202, (c) fact that her domicile was that of husband Daye until final decree April 25, 1925, (d) admission in Plaintiff's Brief on Certiorari (p. 14) that she did not establish alleged Florida residence until after October 20, 1925.

August 29, 1932—Admission that Plaintiff is now a resident of D. C. (R. 1).

actual residence with the intention of making Florida a permanent abode. To qualify as an elector a residence of one year with the same intention is required (Compiled General Laws of Florida, 1927, Compact Edition, Sections 4980, 248).

Not only therefore does the record in the present case show that defendants denied that plaintiff acquired a bona fide domicile in Florida, but other facts in the record show that it is unlikely, to say the least, that she *could have* acquired a bona fide residence in Florida within the short time which elapsed between the date she was adjuded guilty of adultery with Loughran and the date she married Loughran.

Plaintiff moved to have the case heard on Bill and Answer (R. 25) and the case was so heard (R. 32). The only question, therefore, before the Court upon the hearing on Bill and Answer was whether plaintiff having been adjudged guilty of adultery in a divorce suit and having been prohibited by Section 966 of the District of Columbia Code from remarrying, and having removed to Florida and married Loughran, it being denied that she removed thereto and married him in good faith or only for the purpose of evading and circumventing the prohibition of Section 966, was entitled to dower in Loughran's estate in the District of Columbia. This was the sole question before the trial court and the only question open for adjudication in the Court of Appeals. That Court simply held that where a woman adjudged guilty of adultery in a divorce suit went to another State and remarried, and it was denied that she did so in good faith, she could not claim dower in property within the District of Columbia. Anything else in the opinion of the Court of Appeals is obviously dictum and does not entitle petitioner to a reversal in this court. The opinion of the Court of Appeals, therefore, in no way holds that the guilty party in a divorce suit who has in perfectly

good faith removed to another jurisdiction and there established a domicile, and later, without any intention whatever of evading or circumventing the prohibition of the District of Columbia Code against her remarriage, marries in good faith, is without the pale of the law of the District of Columbia such that her second marriage is not entitled to be recognized for purposes of dower in the District of Columbia. Argument of petitioner's counsel on such a situation is beside the point in the present case on the record now before this Court.

It must be remembered that it was plaintiff and not defendant who set the case down for hearing on Bill and Answer (R. 25). This Court has held that a hearing on Bill and Answer is in effect a submission of the cause to the court by the complainant, on the contention that she is entitled to the decree prayed for in the Bill upon the admissions and notwithstanding the denials of the answer.

> *Reynolds* v. *Crawfordsville Nat'l Bank*, 112 U. S. 405, 409; 28 L. Ed. 733, 735; 10 R. C. L. Sec. 220; *Treman* v. *Poor*, 1 Gill, N. J. (Md.) 216, 19 Amer. Dec. 225.

A textwriter states the rule as follows:

> "If the complainant deems the answer, or regards the affirmative defense of the answer, as insufficient to constitute any bar to his relief, he may set the case down for hearing on bill and answer. The answer must be taken as true in all points. *The allegations of fact in the bill that are denied in the answer are to be taken as disproved and the averments of fact in the answer stand admitted.*
>
> . . . . . .
>
> If any material matter charged in the bill is neither denied or admitted by the answer, it stands for naught." (Fletcher, Equity Pleading & Practice, p. 697. Italics ours.)

Applying the above to the present case the allegation of the Bill as to residence or domicile in Florida having been

acquired in good faith, must be taken as disproved. Plaintiff chose by setting the case for hearing on Bill and Answer to submit to the court the sole question of whether the domicile or residence in Florida *not* having been acquired in good faith, and the marriage in Florida *not* being bona fide, but entered into in Florida to evade the prohibition of the District of Columbia law, still the guilty party who remarried was entitled to dower in property located in the District of Columbia.

Counsel herein are aware of the provisions of Equity Rule 33 of the Supreme Court of the District of Columbia, identical with Federal Equity Rule 33, which provides:

> "Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter."

As to this rule the court said in *Shera* v. *Merchants Life Insurance Co.*, 237 F. 484:

> "The present Equity Rules do not seem to contemplate the submission of a case upon Bill and Answer; they seem rather to direct that the sufficiency of the Answer as a defense, in view of the averments of the Bill of Complaint, shall be raised by motion to strike."

On the other hand, as neither the Federal Equity Rules nor the Equity Rules of the Supreme Court of the District of Columbia by their terms abolish hearing on bill and answer, and Equity Rule 33 seems limited by its terms to the special case, it seems likely that the hearing in the trial court on bill and answer was proper. (See Keigwin Cases on Equity Pleading, p. 516.) Certainly such hearings are frequent in that court. In any event, if this court shall be of

the opinion that under the present Equity Rules there is no authority for hearing a case on Bill and Answer, the hearing in the Trial Court must be taken as a hearing under Equity Rule 33 in which the sufficiency of the defense is tested by a motion to strike out. In this case likewise the only question before the court would be whether a domicile and marriage in Florida not in good faith, but in order to evade the District Statute, must be recognized by the District Courts. In view of the provision of Equity Rule 33 that upon a motion to strike, an amendment may be allowed, it is difficult to see how the Court in the present case could have entered a final decree against defendant. It should be noted in this connection that defendant assigned as error that the Court had no power to sign the decree herein (Assignment of error 1, R. 27).

If follows from the above that the only question submitted to the Trial Court and capable of being ruled on by the Court of Appeals in the present case is whether the District of Columbia courts were compelled to recognize a marriage of a guilty party in a divorce suit contracted not in good faith, as a result of a domicile or residence obtained not in good faith in the state of Florida, and on the basis of such marriage allow dower in lands in the District of Columbia in violation of a positive statute of that District.

II.

The Good Faith of the Florida Residence and Marriage Being Denied the Present Case Is Exactly Similar to Olverson v. Olverson 54 App. D. C. 48, Whose Decision the Court Below Merely Followed.

In Olverson vs. Olverson, 54 App. D. C. 48, the Plaintiff, Anna M. Olverson, had been divorced from William C. Heflin on June 10, 1914, on the ground of her own adultery. In spite of Sec. 966 D. C. Code, "while still a resident of the District of Columbia and domiciled therein," she, six

years later, went to Baltimore and married Olverson, returning to Washington after the marriage where she continued to live with Olverson. She later sued Olverson for divorce and asked for alimony, which was denied and the Bill dismissed. Upon appeal the Court of Appeals said:

> "By her Bill of Complaint the appellant demands that she be recognized as the lawful wife of the appellee, and prays, in effect, that the obligation of the status assumed by her in flagrant defiance of the laws to which she was subject be modified or enforced, as her benefit or advantage may require.
>
> We do not think that the courts of the District can be used for that purpose. The appellant deliberately set at naught a District statute, which she was bound to respect and obey, and she cannot now ask the courts of this jurisdiction to relieve her of the obligations of a relation which she willfully and wrongfully assumed, or to enforce the right to support which would have been hers, had the relation been lawfully contracted in the District:
>
> It is the special duty of courts to discourage infractions of the laws and fixed policies of the particular division of the national domain to which they are accredited, and they cannot aid litigants in securing the benefit of illegal transactions or illegal acts, without bringing such laws and policies into contempt. Judicial tribunals may well decline, therefore, to lend their support to claims which are directly and immediately founded upon a violation of the statutes of their territorial jurisdiction. Morck v. Abel, 3 Bos. & P. 35; Collins v. Blantern, 1 Smith's Lead. Cases, pt. 2, p. 716; Vandyck v. Hewitt, 1 East. 96; Clagus v. Penaluna, 4 Term. Rep. 466; Weymel v. Read, 5 Term Rep. 599; Montefiori v. Montefiori, 1 W. Black 363; Wilde v. Wilde, 37 Neb. 891, 56 N. W. 724; Lanktree v. Lanktree, 42 Cal. App. 648, 193 Pac. 954, 955; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Hunter v. Wheate, 53 App. D. C. 206, 289 Fed. 604; Armstrong v. Toler, 11 Wheat. 258, 260, 6 L.

Ed. 468; Hall v. Coppell, 7 Wall. 542, 558, 19 L. Ed. 244; Oscanyan v. Arms Co., 103 U. S. 261, 267, 26 L. Ed. 539; Higgins v. McCrea, 116 U. S. 671, 686, 6 Sup. Ct. 557, 29 L. Ed. 764.

We are of the opinion that a husband or wife, divorced on the ground of adultery, who defies the ban of Section 966, should not be permitted to take advantage of his or her own wrong, and should be left as found in the relation unlawfully undertaken'" (Olverson v. Olverson, 54 App. D. C. 48-49).

It is submitted that the good faith of the removal to Florida and the marriage there being denied, there is no essential difference between the Olverson decision (which has been the law of this jurisdiction for over ten years) and the present case. The only possible chance of showing any distinction between the two cases is to claim, as plaintiff's counsel claims on page 34 of his brief, that the removal to Florida and the marriage there was in "good faith." But if this alleged "good faith" is denied, what difference is there, upon a hearing on Bill and Answer, between the two cases? In each case we have a marriage, a conviction of adultery, a divorce, and the guilty party remarries. In the Olverson case the guilty party remarries six years later in Baltimore. In the present case the guilty party remarries a little over seven months later in Florida. In each case there was a return to the District of Columbia and a resumption of residence here. How soon is not disclosed in the Olverson case, nor very clearly in the present case, though we know that plaintiff herein is now a resident of the District (her Bill so alleges, par. 1, R. 1). The only distinction between the two cases is not in the present plaintiff's favor: Mrs. Olverson at least has the grace not to marry the co-respondent. If there was any flaunting of the Court's decree in the Olverson case, there was an equal amount of it in the present case wherein the plaintiff waited hardly more than seven months after her divorce and then proceeded to marry the co-respondent, her paramour,

though she had the wit to do it in Florida instead of the District of Columbia.

It is submitted that the Olverson case is, as the Court below held, decisive of the present case in every respect upon the present record. Whether it would be if upon a hearing plaintiff could actually *prove* that the Florida residence and marriage was in good faith we need not here discuss. The decision of the Court below must be restricted to the facts presented upon the particular record before it, anything beyond which must be regarded as mere dicta. The only issue before the Court was whether, the good faith of the Florida residence and marriage being denied, the District Courts, as a matter of law, were compelled to recognize a marriage forbidden by a decree of its Supreme Court —a decree entered *in personam*, after personal service upon the plaintiff herein. This was simply the Olverson case all over again, the decision in which was merely followed.

It might be added that petitioner's counsel seems to concede in his brief (Pet. Brief p. 24), that a guilty party who has left the jurisdiction with intent to evade the prohibition, and who has remarried in another jurisdiction is on a different footing from one who has gone to another jurisdiction and remarried "in good faith." But if the good faith is denied, the two are on exactly the same footing, and the same rule should apply.

III.

The Full Faith and Credit Clause Does Not Require the District of Columbia Courts to Recognize a Marriage in Violation of the Public Policy of the District of Columbia Itself.

This Court can take judicial notice that the District of Columbia is less than 10 miles square. It is only a trolley ride or a taxicab trip to Virginia and Maryland. Counsel for respondents might well contend that as Congress has

plenary power to legislate for the District of Columbia, it could prohibit the District of Columbia Courts, in aid of its announced policy against the remarriage of a guilty party in a divorce suit, from recognizing a remarriage no matter where it was celebrated. The Full Faith and Credit Clause of the Federal Constitution does not apply in the District of Columbia; insofar as it is effective, it operates in the District of Columbia only by reason of a Federal Statute (the Act of March 27, 1804; 28 U. S. C. A., Sec. 687) and comity. The Act of March 27, 1804, was, of course, enacted long prior to Section 966 of the D. C. Code. It is unnecessary, however, for respondents herein to contend that Section 966 of the D. C. Code being a later enactment, impliedly modified the earlier statute. It is a well-known exception to the Full Faith and Credit Clause that this clause does not require the courts of a given jurisdiction to recognize a public act of record of another jurisdiction which is contrary to the public policy of the state of the forum (*Simmons* v. *Simmons*, 57 App. D. C. 216, 19 F. (2d) 690, 692). If, therefore, the marriage in Florida was contrary to the public policy of the District of Columbia the Courts of that District were not compelled to recognize it, whether it was entered into in good faith or not.

Counsel for petitioner in his brief argues that Section 966 of the D. C. Code establishes no public policy against a remarriage of a guilty party; that Section 966 merely prohibits such a remarriage and contains no penalty and that the Court of Appeals of the District of Columbia cannot create by judicial fiat a public policy not established by Congress.

In answer, it is difficult for respondents' counsel herein to conceive how Section 966 can be construed other than as a declaration of public policy. You would suppose from reading plaintiff's brief (plaintiff's brief, p. 24), that the only way for Congress to declare the public policy of this jurisdiction would be by an enactment commencing "This

is the public policy of this jurisdiction," thus tagging or labeling the particular section with the capital letters, "PUBLIC POLICY.". Certainly no such method is necessary.

We say that if Section 966 is not a declaration of public policy, what is it? Section 966 *prohibits* remarriage of a guilty party. Why does it prohibit it? Because it is the public policy of this jurisdiction, established by Congress, that the guilty party shall not remarry. Why does Section 966 contain no penalty? Because it is not a penal statute but a declaration of public policy, a declaration of the marital incapacity of a guilty party.

The legislative history of Section 966 shows that it is a declaration of public policy. It was first enacted by the Act of March 3, 1901, 31 Stat. 1345, c. 854, Section 966, and was an amendment to the proposed Code for the District of Columbia. Senate Document No. 174, 56th Congress, 2nd Session, February 19, 1901, entitled "Divorce Law for the District of Columbia," which was submitted to accompany H. R. 9835 (now embodied in Section 966), states.

> "The present divorce law of the District of Columbia, as given in the Sections of the Code which the second Amendment would displace, the Justices of the District Supreme Court and the United States Attorney have unanimously condemned as too lax, in the following written statements."
>
> (Then follows the recommendations of the Judges and the District Attorney, several college presidents, six bishops of various churches, and Cardinal Gibbons, to the effect that the divorce laws should be tightened in the District of Columbia.)

The report concludes:

> "The Amendment is intended to bring the divorce laws that Congress has enacted for the District of Columbia up to the highest grade found in State laws, namely, to that of New York, where absolute divorce is allowed only in cases of adultery. Legal separation

is allowed there, as in this bill, for other causes, but without the dangerous permission to remarry."

The court can also take judicial notice that the divorce laws of the District of Columbia both as to length of time for residence and also in limiting the causes of divorce to adultery, is one of the most stringent in the country. With the exception of South Carolina, where no divorce at all is authorized, the law of the District of Columbia is probably stricter than that of any other State and shows a clear intention on the part of Congress that the District of Columbia shall not become a divorce mill similar to Reno or Paris. Senate Document No. 174 above referred to and the divorce provisions of our Code enacted pursuant thereto are unmistakable statements of public policy. Section 966 in prohibiting the guilty party to remarry shows a clear intention on the part of Congress that an adultress who has victimized one man shall not, at least so far as Congress can prevent it, proceed in a methodical way to victimize another. In such a case Congress has at least seen to it that so far as the District of Columbia is concerned there shall be no financial gain held forth as a reward to the woman who looks upon marriage as an adventure. Nor is there any injustice to the woman in such an enactment; she has notice of the law beforehand and if she remarries one who owns real estate in the District of Columbia, she is on notice that she cannot claim dower in this jurisdiction. The husband is likewise on such notice and if the adultress who was a bad wife to her first husband turns out to be a good wife to her second, he can easily reward her by making a will in her favor.

As to the claim that the public policy of this jurisdiction cannot be created by judicial fiat, it is not so created in the present case. The Court of Appeals has not declared the public policy of this jurisdiction; it has merely taken cognizance of and applied an Act of Congress which declares the public policy of this jurisdiction. In this sense

public policy has frequently been declared by judicial decision and this court has frequently approved of its being so declared where it is established by a statute which is merely construed as to its meaning and effect by the courts. (See *Vidal et. al.* v. *Girard's Executors*, 2 How. 127, 197, 11 L. Ed. 205, 234; *Hartford Fire Insurance Co.* v. *C. M. & St. P. R. Co.*, 175 U. S. 91, 110, 44 L. Ed. 85, 98.)

Further, it seems to be conceded by Petitioner's counsel that if the marriage in the present case were a polygamous, incestuous or an abhorrent marriage, the full faith and credit clause would not require it to be recognized in the District of Columbia even though it had been entered into in Florida. Thus, counsel for Petitioner in his brief cites Section 137, page 176, of the American Law Institute's Restatement of the Law of Marriage and Divorce:

> "If the requirements of the law of the state of celebration are complied with, the marriage is valid, except under the circumstances stated in Section 140 (Polygamous, incestuous and abhorrent marriages), although the parties to the marriage went to that State in order to evade the requirements of the law of their domicile" (Petitioner's Brief, p. 18).

There is a similar exception in Section 138 of the Restatement:

> "Section 138. Marriage after Divorce.—If, by a decree of divorce validly granted in one State, one party is forbidden for a certain time or during his life to marry again, and he goes into another state and marries according to the law of that state, the marriage is valid and will be so recognized even in the state in which the divorce was granted, except as stated in Section 140" (Polgamous, incestuous and abhorrent marriages). (Petitioner's Brief, p. 18).

A similar exception occurs in Section 139 relative to marriage after the parties to a divorce have both been forbidden to remarry. Section 142 of the Restatement likewise provides:

"Section 142. Marriage Contrary to Public Policy.—If any effect of a marriage validly created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage. Comments:

'(a) The action of the state in refusing to give effect to a marriage on the ground stated in this Section does not deny the validity of the marriage, but precludes the enjoyment within the state of some particular right incident to the marriage.'

(Present counsel's comment: Such as the right of dower in the present case.)

(b) The mere fact that the marriage is contrary to statute of the forum does not make it so offensive to policy as to be refused enforcement.

(c) It is ordinarily offensive to the law of a common-law state to allow cohabitation, incestuous by its laws, though the parties were vadidly married in a state which permitted the marriage.' " (Petitioner's Brief, pp. 23-24.)

All of the above Sections of the Restatement are quoted by counsel for plaintiff in his brief herein (Brief, pp. 18, 19, 23, 34). They are of interest in the present case for the reason that Congress in enacting the District of Columbia Code has put the marriage of persons whose previous marriage has not been terminated by divorce in exactly the same classification as incestuous and polygamous marriages. Thus, Chapter 43 of the District of Columbia Code, under the heading, Marriage, provides:

"Sec. 1283. Prohibitions.—The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceeding.

First. (Incestuous marriage of a man.)

Second. (Incestuous marriage of a woman.)

> Third. The marriage of any persons either of whom has been previously married and whose previous marriage *has not been terminated by death or a decree of divorce.*" (Italics ours.)

If, therefore, the marriage in the present case has not been "terminated" by death or a "decree of divorce" it is in exactly the same classification as an incestuous marriage. The latter marriage both the Restatement and presumably counsel for plaintiff herein concede need not be recognized in this jurisdiction.

Has the marriage of plaintiff to Daye in the present case been "terminated" by a decree of divorce within the meaning of the word "terminate" as used in Section 1283?

It should be noted that Section 1283 prohibits marriage of a person whose previous marriage has not been terminated *by death or a decree of divorce.* Certainly the decree of divorce in the present case containing by reference the prohibition against remarriage is no such complete termination of the marriage as death. If, therefore, the reference to death in this paragraph be regarded as throwing any light upon the intention of Congress, as to what constitutes a termination of marriage, a decree of divorce which contains an interdiction against remarriage is not in the same class with a marriage terminated by death.

Websters Dictionary defines terminate as follows:

> "Terminate: To put an end to; to make to cease, to end; as, to terminate an effort, or a controversy."

Insofar as plaintiff, the guilty party, was concerned, her marriage was not terminated in any final sense of the word. It could only be terminated by judicial decree and the decree expressly reserved, the statute being read into it, the right of plaintiff to remarry. The decree, therefore, did not constitute the absolute termination of the marriage; something remained which could have been awarded plaintiff (were it

not for the prohibition of Section 966) but which was not.

The grant of power to the innocent party to remarry is in effect the denial of power to the guilty party to remarry. Something, therefore, was denied to the guilty party; something, therefore, was withheld by the decree; it awarded a divorce but there was "a string tied to it" so far as the guilty party was concerned. The marriage therefore was not *absolutely* terminated within the meaning of Section 1283.

A further indication that the marriage has not been "terminated" in any absolute or complete sense is the fact (which is made much of in plaintiff's brief, p. 26) that Section 966 of the District of Columbia Code prohibiting the remarriage of a guilty party does not in so many words prescribe a penalty. It must be presumed that Congress enacted this section with some intelligent purpose in mind and intended to make it as effective as it reasonably could. If it be conceded that it prescribes no penalty, and if it does not impinge upon the completeness of the decree of divorce, it follows that it is ineffective for any purpose whatsoever. The only rational interpretation of this section is that it is a statutory provision which is read into the decree of divorce in an applicable case and that it deprives that decree of the absoluteness and completeness which it would otherwise have.

It follows, therefore, that plaintiff's right to remarry at all being conferred solely by the decree of divorce obtained against her by Daye, and this decree, having read into it, by necessary implication, a grant of power to Daye alone to remarry, with the subsequent prohibition directed against plaintiff remarrying, plaintiff's divorce was not the absolute termination of her marital status. Her divorce decree carried with it a statutory declaration of marital incapacity.

It should be noted also that the proviso of Section 966 to the effect that only the innocent party may remarry is

contained in the very section which conveys power upon the court to grant a divorce. Certainly it cannot be contended that a court of the District of Columbia could, in the teeth of Section 966, pass a decree of divorce authorizing the *guilty party* to remarry. This being so, the reservation of the right of the guilty party to remarry is a limitation upon the power of the court to terminate a marriage by divorce. The marriage, therefore, is as contended herein, not "terminated" in any real sense of the term for the reason that it can only be terminated by decree; the decree can only be entered pursuant to the power conferred in Section 966 and that power is by a proviso limited to the power to award a decree permitting the innocent party only to remarry. A proviso has been defined as:

> "A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it" (59 C. J. 1087).
>
> "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation" (*U. S.* v. *Morrow*, 266 U. S. 531, 534, and cases cited).

The grant of power to terminate a marriage contains, therefore, the exception that a court shall reserve in its decree the right of the guilty party to remarry. If so, the marriage has not absolutely been terminated.

The importance of whether plaintiff's marriage has been "terminated" within the meaning of Sec. 1283 becomes clear when it is considered that Section 1287 of the District of Columbia Code makes illegal in the District any marriage of persons domiciled in the District, if celebrated outside of the District, which marriage is illegal inside the District. Section 1287 provides:

"Sec. 1287—If any marriage declared illegal by the aforegoing Sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be considered to be void in said District in the same manner as if it had been celebrated therein."

If, therefore, plaintiff's marriage had not been "terminated" by divorce within the meaning of Section 1283, and if plaintiff still retained her domicile in the District of Columbia, her marriage in Florida would, under the third subsection of Section 1283 be null and void *ab initio* even though it were in fact celebrated in Florida. We feel that in our discussion in Point I of the present brief that we have shown not only that defendant denied the good faith of the Florida domicile and marriage but that there is, to say the least, a strong probability, shown by plaintiff's own statements and ascertainable from the present record, that she never acquired a domicile in Florida, good, bad or indifferent, but that on the contrary she was still in reality domiciled in the District of Columbia at the time of her Florida marriage to Loughran. If so, under Section 1287, read in connection with Section 1283 (3), the Florida marriage was absolutely void *ab initio* and its validity could be taken notice of in the present collateral proceedings.

IV.

A Court of Equity Has the Right to Deny Equitable Relief to One Who Has Deliberately Created a Situation Contrary to the Public Policy of the Lex Fori.

Petitioner herein, *in Equity*, seeks the remedy of the District of Columbia Court, whose decree in *personam* she has flouted and ignored. Her claim for dower is founded upon a marriage prohibited by a statute of the jurisdiction in which she seeks relief.

The principle advanced by respondents and adopted by the lower court, is that Petitioner cannot enter the courts of the District of Columbia and seek the assistance of the dower statute of the District of Columbia upon a status created in contravention of the laws of the District of Columbia.

Abundant authority for this position is found in the following cases:

Armstrong v. *Toler*, 11 Wheat. 258, 260, 6 L. Ed. 468;
Hall v. *Coppell*, 7 Wall. 542, 558, 19 L. Ed. 244;
Oscanyan v. *Arms Co.*, 103 U. S. 261, 267, 26 L. Ed. 539;
Higgins v. *McCrea*, 116 U. S. 671, 686, 6 Sup. Ct. 557, 29 L. Ed. 764;
Hunter v. *Wheate*, 53 App. D. C. 206, 289 Fed. 604;
Olverson v. *Olverson*, 54 App. D. C. 48, 293, Fed. 1015;
Morck v. *Abel*, 3 Bos. & P 35;
Collins v. *Blanterm*, 1 Smith's Lead. Cases, pt. 2, p. 716;
Vandyck v. *Hewitt*, 1 East. 96;
Clugas v. *Penaluna*, 4 Term Rep. 466;
Weymel v. *Read*, 5 Term Rep. 599;
Montefiori v. *Montefiori*, 1 W. Black. 363;
Wilde v. *Wilde*, 37 Neb. 891, 56 N. W. 724;
Lanktree v. *Lanktree*, 42 Cal. App. 648, 183 Pac. 954, 955;
Beard v. *Beard*, 65 Cal. 354, Pac. 229.

The language of this court in *Higgins* v. *McCrea*, *supra*, is peculiarly pertinent here:

> "If from the plaintiff's own stating, otherwise, the cause of action appear to arise ex turpi cause, or the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant but because they will not lend their aid to such a plaintiff."

In *Oscanyan* v. *Winchester Co.*, 13 Otto 261, 26 L. Ed. 539, 543, this court said:

> "The defense is allowed, not for the sake of the defendant *but of the law itself.* The principle is indispensable to the purity of its administration. *It will not enforce what it has forbidden and denounced.* The maxim, ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form, to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. *The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.*" See also *Holman* v. *Johnson*, 1 Cowp. 343. (Italics ours.)

No principle seems to be better settled than that no court will lend its aid to one who founds his cause of action upon an illegal act. The good faith of the alleged Florida residence and the marriage therein being denied the petitioner appeared to the Court below as one whose position was created by reason of her violation of Section 966 of the District of Columbia Code (1924), a positive law of the District of Columbia. Upon that ground, the court refused to lend to her its aid. The status she created was prohibited by law, on this present record.

In *Hall v. Coppell*, 7 Wallace 542, this Court said:

> "The law will not lend its support to a claim founded upon its violation."

Considering these cases, it is submitted that the Court below was correct when it said (R. 34):

"It is the special duty of courts to discourage infractions of the laws *and fixed policies of the particular division of the national domain to which they are accredited,* and they cannot aid litigants in securing the benefit of illegal transactions or illegal acts, without bringing such laws and policies into contempt. Judicial tribunals may well decline, therefore, to lend their support to claims which are directly and immediately founded upon a violation of the statutes of their territorial jurisdiction. * * * We are of the opinion that a husband or wife, divorced on the ground of adultery, who defies the ban of Section 966, should not be permitted to take advantage of his or her wrong, and should be left as found in the relation unlawfully undertaken." (Italics ours.)

V.

Valid Where Performed, Valid Every Where Doctrine, Has No Application Herein.

Many cases are cited by petitioner to the effect that a marriage valid where performed is valid everywhere. To this rule there are exceptions as well known as the rule itself. Of these the most important is a marriage which the legislature, either by express terms or necessary implication has declared to be invalid because of the public policy of the enacting state. In Section 966 District of Columbia Code (1924), Congress has declared the public policy of the District of Columbia. By the statute a personal incapacity to marry is imposed. The language of this Court in *Maynard* v. *Hill,* 125 U. S. 190, 205, 31 L. Ed. 657, indicates the control over the marriage status possessed by the legislature.

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people, than any other institution, has always been subject to the control of the legislature."

The Court below interpreting the statute has announced the public policy of the District of Columbia when it said (R. 34):

> "It is the special duty of courts to discourage infractions of the law and *fixed policies of the particular division of the national domain to which they are accredited.*"

If the statute prohibiting the remarriage of the guilty party in divorce actions, contrary to the statute of the forum, is interpreted as an expression of the public policy of the enacting state, then a subsequent marriage in another jurisdiction is invalid in the enacting state, notwithstanding the *lex loci* of the second jurisdiction. The soundness of this contention is supported by:

Andrews v. *Andrews*, 188 U. S. 14, 47 L. Ed. 366;
Haddock v. *Haddock*, 201 U. S. 564, 50 L. Ed. 867;
Georgia v. *Tutty*, 41 Fed. 753 (C. C. S. D., Ga., 1890), 7 L. R. A. 50;
Jackson v. *Jackson*, 82 Md. 17, 34 L. R. A., 773, 775;
Simmons v. *Simmons*, 57 App. D. C., 216, 19 F. (2d) 690;
Pennegar v. *Tennessee*, 87 Tenn. 244, 2 L. R. A. 703;
Williams v. *Oates*, 27 N. C. 535;
In re Stulls Estate, 183 Pa. 625, 39 L. R. A. 539;
Heflinger v. *Heflinger*, 136 Va. 289, 118 S. E. 316, 32 A. L. R. 1095.

Authority therefor is also found in Section 142, page 181 of the *Restatement of the law of contracts* by the American Law Institute, which provides:

> "If any effect of a marriage validity created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage."

In view of the above it is submitted that even conceding the Florida marriage to be valid in Florida, the faith and

credit clause of the Constitution does not compel its recognition in the District of Columbia. The exception relative to public policy is decisive of the issues herein presented. Whether such marriages are prejudicial to the public policy of the District of Columbia is for Congress to determine. Congress by the pertinent statutes has done so. That statute has been interpreted by the Court of Appeals as declaratory of the public policy of the District of Columbia. This Court should sustain it.

Conclusion

If *Certiorari* was granted herein on the theory that a substantial question of Conflict of Laws or Full Faith and Credit was involved, it is suggested, with deference, that the Writ should be dismissed. On any other theory, the judgment below should be affirmed.

Respectfully submitted,

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